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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Telephone Number Portability

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CC Docket No. 95-116
RM 8535

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Introduction and Summary

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, files this reply to the initial comments on the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.¹ Omnipoint maintains that the statutory principle of competitive neutrality² requires that number portability cost rules include two basic features. First, each carrier should be required to pay an equitable proportion of the costs of facilities shared by all carriers, such as the cost of building and maintaining a database operated by a neutral party to facilitate number portability, and this proportion should be calculated on a per-query basis rather than by using gross revenues. Second, each carrier should be required to bear the costs of upgrading its own network, whether the improvements are directly attributable to number portability or not, because any cost-spreading scheme would undercut competition and invite abuse.

¹ In the Matter of Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 95-116, RM 8535, FCC 96-286, ¶¶ 199-230 (released July 2, 1996).

² 47 U.S.C. §251(e)(2) (requiring that costs "be borne by all telecommunications carriers on a competitively neutral basis").

Discussion

I. Each Carrier Should Pay an Equitable Share of Common Costs

Omnipoint submits that the fairest way to allocate the common costs associated with implementing number portability is to charge a fixed fee to the calling carrier for each query to the number portability database.³ The FNPRM's proposal to allocate common costs based on gross revenues⁴ would put new entrants -- particularly wireless providers and others who plan to offer services not available from incumbent wireline LECs -- at a competitive disadvantage because added functionality is likely to be accompanied by higher prices, so any fee calculated by reference to gross revenues would impose higher costs on carriers who provide advanced services. A PCS customer's call employing digital wireless technology requires the same query as a wireline call, so the PCS provider should not be forced to contribute more money per call than the wireline carrier. A per query charge would ensure that common costs are allocated proportionately.⁵ As the Commission noted in the First Report on Interconnection⁶ with regard to efficient pricing of database service network elements: "[r]ates for signaling and database services should be usage-sensitive, based on the number of queries or the number of messages Usage charges of this type appear to reflect most accurately the underlying costs of these services."

³ The fee would incorporate non-recurring common costs, recurring maintenance costs, and the incremental costs of uploading and downloading information from the database.

⁴ FNPRM at ¶ 213.

⁵ Cf. Comments of California PUC at 7 (recommending per-line charge to avoid disproportionate payment problem created by revenue-based charge); Comments of Ameritech at 10 (proposing usage-sensitive rate).

⁶ "Implementation of Local Competition Provisions in the Telecommunications Act of 1996," First Report and Order, CC Dkts. 96-98, 95-185, FCC 96-325, 61 F.R. 45475, at ¶ 825 (Aug. 29, 1996) ("First Report on Interconnection").

Omnipoint believes that all “telecommunications carriers” should help pay the common costs of number portability, including resellers and interexchange carriers, because the 1996 Act expressly requires them to do so.⁷ Congress easily could have limited the allocation of costs to carriers that provide “telephone exchange services,” but it did not choose to include such a limitation,⁸ so the conclusion is inescapable that all carriers should be subject to the number portability cost rules.⁹

II. No Carrier Should Be Required to Pay to Upgrade a Competitor’s Network

A. Number Portability Is A Public Interest Requirement That Each Carrier, On Its Own, Must Meet

A number of incumbent local exchange carriers suggest that they should not be required to pay to upgrade their networks to accomodate number portability because the resulting added capabilities would make it easier for their customers to switch to other carriers.¹⁰ They argue, in effect, that they should not have to pay for improvements to their facilities that will have the

⁷ See 47 U.S.C. §251(e)(2); §153(44); see also Comments of Association for Local Telecommunications Services at 2 (arguing §153(44) should be applied).

⁸ Id. at §153(47); see Comments of SBC Communications at 4 (contending Congress would have provided for any intended exclusion in express terms).

⁹ See City of Chicago v. Environmental Defense Fund, 114 S.Ct. 1588, 1593 (1994) (“[I]t is generally presumed that Congress acts intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another’”) (internal citations omitted).

¹⁰ See, e.g., Comments of USTA at 2-5; FNPRM at ¶ 215.

effect of helping their competitors.¹¹ These attempts to revisit the merits of number portability are based on the flatly faulty premise that portability -- and in turn, competition -- benefit only new competitors and not the public interest.¹² Congress and the Commission have established number portability as a cornerstone of pro-competitive local telecommunications regulation, and the time to debate this policy choice is now past.

Moreover, number portability is not solely a burden for incumbent LECs and a benefit for new entrants. Number portability is a technical advancement of the PSTN that will help all consumers choose the most efficient provider and this, in turn, will increase overall usage of the telephone network for the enrichment of consumers and industry alike. It is by no means clear which carriers, if any, ultimately would choose not to upgrade their networks in the absence of a regulatory requirement that they do so.¹³ Even USTA admits that in the absence of a legal requirement to upgrade, incumbent LECs may be compelled by "technical requirements" to upgrade in order to continue to process calls.¹⁴ The need to make investments to maintain the compatability of a network with the technology used by competing carriers is not a regulatory requirement justifying compensation through regulatory taxation; it is an inevitable -- if not immediate -- business necessity dictated by emerging market forces.

¹¹ Some LECs argue that costs must be pooled in order to ensure that their ability to earn a set rate of return and to guarantee that the cost of providing number portability does not vary from carrier to carrier. See, e.g., Comments of SBC Communications at 13. These LECs do not seem to understand that, in a competitive market, each company's return is determined by the wisdom of its investment choices and must necessarily vary if consumers are to reap the benefits of competition. See Comments of BellSouth at 3 (arguing that the idea that "a competitively neutral cost recovery mechanism should not have a disparate impact on the ability of competing service providers to earn a normal rate of return . . . smacks of protectionist, rate of return regulation").

¹² Comments of USTA at 2 ("there is no independent justification for such investments").

¹³ See Comments of USTA at 2-4 (arguing small LECs will not upgrade unless required to do so).

¹⁴ See Comments of USTA at 3, 6.

While the LECs complain that they will receive all of the burden from number portability, the LECs also stand to benefit directly from number portability. For example, once the market for local exchange service stabilizes in the wake of the initial wave of competition, number portability will more easily permit the LEC to lure back customers with better services and/or prices from today's "new entrants." Given that the Section 271 competitive checklist requires some measure of local facilities-based competition,¹⁵ this day is not far off by the RBOCs' own account. Apart from the benefits that competition brings to all consumers, several commenters indicate that the many network improvements necessary to provide number portability help carriers provide other services as well. See, e.g., Comments of California PUC at 3 (arguing that AIN and SS7 upgrades help provide other services). In addition, service and location portability will benefit incumbents as well as newcomers.

B. Each Carrier Should Pay Its Own Costs for Network Upgrades

Omnipoint submits that all carriers should pay a proportion (measured on a per-query basis) of the cost of the independent database, and each carrier should pay on its own the costs required to upgrade its network to implement number portability. Requiring that each carrier pay for its own network is the most "competitively neutral" implementation scheme; it also eliminates potential for abuse as well as administrative and dispute costs.

Competitive neutrality must embody the principle that the regulatory scheme will not interfere with market forces. If one competitor has a more sophisticated network, and already complies with public interest requirements applied to the entire industry, the regulatory framework should not penalize that more advanced network. Requiring each carrier to pay its own costs also imposes real market discipline into each carrier's upgrade decisions and so keeps expenditures for upgrades at efficient levels. As one commenter put it,

¹⁵ 47 U.S.C. § 271(c)(1)(A) (In order to gain approval to offer interLATA telecommunications, RBOC must have approved interconnection agreement with in-region facilities-based competitor).

Requiring each carrier to bear its own infrastructure investment costs ensures that each carrier will make efficient infrastructure decisions and protects against exaggeration of internal costs by incumbent LECs. In contrast, if costs incurred by a carrier are thrown into a pool to be funded by all carriers, inefficient companies will be rewarded by being subsidized by their competitors.¹⁶

With each carrier bearing its own cost, the implementation is also simplified by keeping the Commission and the states out of the business of allocating costs, policing abuses, as well as distributing and collecting funding for a host of carrier upgrades.

Finally, requiring all carriers to pay for their own network upgrades is the only *equitable* solution, because many competing new entrants have already paid the price to ensure that their networks are compatible with number portability. Since these new entrants have already paid for advanced networks, they should not be required to subsidize incumbent LECs for their shortsighted decisions not to upgrade their networks. It would be particularly inequitable to force small business new entrants, that have limited resources, to pay for upgrades to the incumbent LECs' networks.

C. Cost Pooling is Contrary to "Competitive Neutrality," It is Unfair to New Entrants, and It Creates Needless Administrative Expense

As discussed above, "competitive neutrality" requires each carrier to pay its own costs; a scheme of pooling costs, whereby asserted costs of a particular carrier's network improvements related to number portability implementation are reapportioned across all competing providers, establishes a disincentive to be efficient. Moreover, it directly interferes with market forces by requiring competing carriers to bear the costs of each other's network decisions, as opposed to exploiting the differences in network decision-making as would occur in a market-based environment.

In addition, pooling costs makes little sense both economically and equitably given that all carriers must comply with the same number portability standards. For example, Omnipoint

¹⁶ Comments of Teleport Communications Group at 8.

has invested substantial resources in its network technology which will ensure compliance with the Commission's number portability requirements. We are quite sure that other new entrants, and perhaps even some incumbent providers, have also invested heavily in network number portability solutions prior to the implementation of the Commission's cost support scheme. Therefore, it only makes sense that everyone should receive compensation from the pool to which everyone is contributing, even for prior network investments. However, if everyone is paying into the same pool from which they are receiving compensation, it seems much more reasonable to abandon the pool mechanism altogether and, with the benefit of market discipline, require each carrier to pay for its own network upgrades.

Finally, spreading the costs of upgrading the networks of individual carriers would impose enormous administrative burdens on the Commission, the states, and the carriers who would be subject to the cost rules. USTA's proposal, for instance, would create a complicated set of highly subjective cost categories.¹⁷ These categories are based on the same flawed logic outline above, and they should be rejected for the reasons already stated. Even if the incumbent LECs were correct in arguing that the necessary upgrades are of no benefit to them or their customers, the regulatory infrastructure necessary to monitor the accuracy and reasonableness of cost submissions would be enormous, and the Commission should avoid creating such a Byzantine system of cost recovery.¹⁸ Indeed, Ameritech concedes that "[a] mechanism involving pooling is administratively expensive and may [create an incentive for] and reward

¹⁷ Comments of USTA at 11 (dividing costs into five categories). The pooling proposals advanced by the incumbent LECs share the same fundamental weaknesses as the USTA plan. For example, SBC Communications argues for pooling carrier-specific costs that would not have been incurred "but for" the deployment of LNP. Comments of SBC Communications at 6. This "but for" test assumes that the motivation behind infrastructure improvements can be easily identified, an assumption that is mistaken.

¹⁸ See Comments of PCIA at 6 (arguing for simplicity and ease of administration as primary goals of system for allocation of number portability costs).

inefficiency.”¹⁹ If the states are allowed to establish their own rules governing the allocation of number portability costs, the problem would be even worse because new entrants would be forced to fight any abuses on a market-by-market basis, delaying their entry and raising costs.²⁰

For these reasons, Omnipoint urges the Commission not to impose a cost pooling scheme for the nearly exclusive use of those incumbent LECs that, to date, have failed to implement number portability solutions in their networks.

III. Number Portability Charges Should Be Based on a Uniform National Policy

Several public utility commissions argue that the states should be given authority over the recovery of number portability costs.²¹ Omnipoint suggests that pricing rules for state-specific databases should be governed by a single, national policy.²² The Commission correctly perceives that a single set of nationwide rules “will help to maintain consistency between states, thereby improving the likelihood that competition will develop nationwide.”²³ Additionally, to the extent that any pooling arrangement is established, it should be administered on a centralized basis in order to simplify compliance for carriers.²⁴ Omnipoint notes that this result is also consistent with the Commission's decision in the Second Order to establish a uniform national numbering administration policy. “By retaining authority to set broad policy on numbering administration matters, we preserve our ability to act flexibly and expeditiously on broad policy

¹⁹ Comments of Ameritech at 7.

²⁰ Even a national pooling system would force competitive carriers to perform expensive and time-consuming cost studies that would place serious burdens on their ability to compete. Comments of Teleport Communications Group at 8.

²¹ See generally Comments of California PUC, Comments of New York State Department of Public Service; FNPRM at ¶ 211.

²² See Comments of PCIA at 6 (proposing adoption of national pricing principles).

²³ FNPRM at ¶211.

²⁴ See Comments of PCIA at 7 (arguing for centralized administration).

issues and to resolve any dispute related to numbering administration"25 For the same reasons of expeditious deployment of number portability and control of the way costs are allocated among competing providers, the Commission, and not the states, should establish a comprehensive cost allocation scheme.

CONCLUSION

Omnipoint believes that the Commission should adopt the simplest, fairest possible approach to the allocation of number portability costs. By establishing a system for the recovery of shared costs while leaving responsibility for other upgrades with individual carriers, the Commission can avoid creating serious administrative difficulties for itself and the carriers it regulates while maintaining competitive neutrality.

Respectfully submitted,

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Date: September 16, 1996

25 "Implementation of Local Competition Provisions in the Telecommunications Act of 1996," Second Report and Order and Memorandum Opinion and Order, CC Dkts. 96-98, 95-185, FCC 96-333, 61 F.R. 47284, at ¶ 271 (Sept. 6, 1996) ("Second Order").

CERTIFICATE OF SERVICE

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